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IN THE

Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

Petitioners,

v.

DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. Its

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

general mission includes education and legal efforts directed towards promoting individual liberty and free enterprise. Specifically, EFELDF has strived for years to defend and protect educational opportunity. EFELDF has long been an advocate for enhancing opportunities for women without ignoring important differences between the genders. EFELDF has successfully filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals, including the proceeding below. EFELDF also participates in educating and training students of all ages.

Amicus curiae has a direct and vital interest in the issues presented to this Court based on an active participation in education for over two decades, and respectfully submits this brief in support of the Petition.

SUMMARY OF ARGUMENT

Petitioners have standing to challenge unlawful government policies that adversely affect them. Where, as here, government has promulgated a policy that embraces gender quotas, those harmed by schools attempting to satisfy the quotas have standing to challenge it. In dismissing Petitioners' complaint on standing and redressability grounds, the decision below contravened precedents of this Court and conflicted with other Circuits.

Gender quotas are contrary to applicable statutes. The federal government has unlawfully authorized and encouraged a gender quota through creation of a safe harbor for schools. Grievances suffered by Petitioners by virtue of a federal safe harbor for gender quotas in school sports are actionable in federal court.

Specifically, Petitioners have standing to challenge the "proportionality test" that encourages colleges to reduce the proportion of men on their sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy Interpretation directs that "in-

tercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments") (as reaffirmed in 1996 and 2003). The proportionality test imposes a quota requiring the gender ratio of athletes on competitive teams to match the gender ratio enrolled in the school.

College wrestling, an extremely inexpensive sport, has suffered a calamitous drop of 171 teams over two decades as schools eliminate large-squad men's teams to reduce their numbers relative to the women athletes. When Howard University drops both its baseball and wrestling teams in the face of this policy, the affected students have standing to challenge the policy. The same standing exists for students suffering from the elimination of teams at other schools, including Yale and Marquette as represented by Petitioners, and their injury is redressable by invalidating the quota policy.

As recognized by the dissent below, the panel majority contravened well-established precedents in holding that where third parties (schools) are inflicting the damage, the victims may not challenge the government policy that encourages and protects the wrongful conduct. Unless overturned, the holding below promises to create havoc in the ability of persons to challenge and overturn unlawful government policies that cause injury to them.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH RULINGS OF THIS COURT AND OTHER CIRCUITS CONCERNING STANDING.

The allegations in the complaint, taken as true, thoroughly satisfied the requirement for standing prevailing in most Circuits. As Judge Williams explained below in dissent:

> The complaint clearly alleges that the Department regulations and policies represented a 'substantial factor' in educational institutions' decisions on the number and composition of sports teams. Paragraph 48 of the First Amended Complaint says that either as a direct result of the Department's enforcement action or in order to avoid becoming the target of such action, educational institutions 'have limited male participation opportunities to comply with [the Department's] unlawful Title IX policies,' and that as a result of these policies institutions 'have cut (*i.e.*, eliminated) hundreds of men's teams and have capped (*i.e.*, arbitrarily limited) hundreds of men's participation opportunities.' The First Amended Complaint (PP 50-52) also specifically alleges that wrestling teams at Bucknell, Marquette and Yale were eliminated in order to comply with the Department's Title IX policies.

National Wrestling Coaches Ass'n v. Dep't of Ed., 366 F.3d 930, 952 (D.C. Cir. 2003) (Williams, J., dissenting). This easily satisfies the requirement for standing of cognizable injury to members as set forth by this Court and followed by the majority of Circuits. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-44 (1977); *see also United Food and Commercial Workers Union Local 751 v. Brown Group Inc.*, 517 U.S. 544, 551-58 (1996); *Air Transport Ass'n of Am. v. Reno*, 80 F.3d 477, 483-85 (D.C. Cir. 1996).

In granting the Respondent's motion for dismissal, the decision below conflicts with these precedents by denying court access to persons aggrieved by a government policy that violates its statutory mandate and causes Petitioners injury. Title IX mandates that no one "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on account of sex. 20 U.S.C. § 1681(a). Yet the "proportionality test," 44 Fed. Reg. 71,418, does dis-

criminate based on a numerical, quota-like system causing the elimination of many teams and athletes based on gender.

The United States General Accounting Office (GAO) studied the conduct of college athletic departments between 1992-93 and 1999-2000. The GAO's estimates, which understate the problem, found that colleges discontinued 171 intercollegiate men's sports teams during that period. Joint Appendix below [hereinafter, "JA"] at 372. Because it did not even address capping, whereby non-scholarship students on men's teams are cut to advance the goal of proportionality with women athletes, the GAO report overlooked the additional amount of men's athletic opportunities lost due to the proportionality test. College athletic directors candidly admitted in the GAO survey that "Gender Equity Goals/Requirements" were one of the most significant factors causing the elimination of men's teams. JA 378.

The GAO report demonstrates that colleges eliminated many teams to satisfy "requirements" of gender equity, satisfying the causation element of standing. *Id.*; *Joseph v. United States Civil Serv. Comm'n,* 554 F.2d 1140, 1145 (D.C. Cir. 1977) ("The injury need not be substantial. A trifle is enough for standing."). Had the Department of Education authorized colleges to discriminate by race in an analogous manner, there would be no doubt that standing would exist. Congress did not remove jurisdiction from the federal courts over this issue, and courts should not abdicate it on their own. An official encouragement or authorization to engage in numerical balancing is reviewable, particularly when the statute itself so clearly prohibits the policy at issue. 20 U.S.C. § 1681. Petitioners should not have lost their day in court because of "unadorned speculation" as held by the court below. 366 F.3d at 938, 943, 944 (quotations omitted). Petitioners more than met their pleading requirements for standing.

Where, as here, the conduct causing injury would have been illegal in the absence of the government action, there is standing by the victims to contest the policy. The Department

of Education has replaced legitimate demand for competitive sports by students with a mathematical formula contrary to the spirit and letter of the statutory mandate. The casualties are men and women alike. Popular men's teams are eliminated in favor of sparsely attended women's teams, many of which flounder or disband due to lack of participation. Women's crew teams, with the potential for large squad sizes, are being promoted by colleges at the expense of smaller but more popular women's sports. It does not help women to offer a sport that does not even exist at the vast majority of high schools. Men's wrestling teams, in contrast, are often eliminated because of their large squad sizes, notwithstanding that they have relatively small costs. Indeed, even *self-funded* teams cannot play in this numbers game.

At issue here is government control at its worst, wholly unsupported by statutory authority. A school perhaps would consider replacing its small, but popular, women's gymnastics team with a larger crew team, made up of women with no crew experience or interest. If it did so, the gymnasts, active in their sport since early childhood, could try to reason with their school. Absent the challenged Title IX policies, the school could meet their needs and assert its right to education autonomy. *See Grutter v. Bollinger,* 539 U.S. 306, 328-30 (2003). However, the Department of Education has severely limited that dialogue with women student athletes, and has virtually precluded any meaningful dialogue with male student athletes. Given that it acted outside the Administrative Procedure Act rulemaking requirements and brushed aside questions of its legal authority, it is no wonder that the Department acted *ultra vires.*

While Title IX requires equal opportunity, the Department of Education unlawfully mandates equal participation as an end in itself. *See Freeman v. Pitts,* 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"). This Court has called it "nonsensical" to measure alleged discrimination by comparing participation levels from highly

specialized pursuits with a general population, which is what the proportionality test essentially encourages. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 105, 105 Stat 1074-1075, 42 U.S.C. § 2000e-2(k) (1994 ed.); *cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 997 (1988) ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"). The proportionality test enshrines the overall student population at a school as the yardstick for athletic opportunity, disregarding the massive evidence that students entering college may have formed divergent levels of interest in intercollegiate athletic competition. *See, e.g.*, JA 262-70, 364. This policy encourages illegality, as any appropriate discrimination analysis requires comparison with the qualified applicant pool, not the general population. *See, e.g., Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989).

Neither experience nor logic nor the law supports the view that male and female demand for competitive sports must be identical. Women do not have as great an interest in team sports as men do, and the converse is true for many extracurricular activities. JA 262-63. It is scientific, not stereotypical, to survey students and observe their differences in interests and needs by gender. To no one's genuine surprise, surveys show that high school senior boys are far more physically active than high school senior girls are. For example, the Department's National Center for Educational Statistics ("NCES") polled high school seniors who "actively participate in sports, athletics or exercising [e]very day or almost every day" over a fifteen-year period from 1980 to 1994. By a wide twenty percent margin, males were more active than females in athletic activity. *Id.* at 263. Similarly, males exercise vigorously (e.g., jogging, swimming, calisthenics, or other active sports) in much higher percentages than females

do. *Id.* In 1992 and 1993, over twice as many high school males exercised as vigorously as females. *Id.* This is a genuine difference in athletic interest, encompassing exercise beyond available competition. *See* John Tierney, "Why Don't Women Watch Women's Sports?," Week in Review, *N.Y. Times* (June 15, 2003) ("The audience for this year's championship game in women's college basketball was 57 percent male, according to Nielsen Media Research. Annika Sorenstam's appearance in the Colonial golf tournament last month may have been a giant leap for women, but 65 percent of the witnesses were men.").

Men and women are no more likely to have identical interests in competitive sports in college than they were in high school, where their interests diverged by a wide margin. JA 263. Surely one would not expect the fans at a typical professional sporting event to be split evenly between men and women. Title IX does not require equal intercollegiate competition, nor can the Department of Education lawfully encourage such a goal.

This Court has made clear that indirect injuries based on government policies or authorizations suffice to establish standing to challenge them. *See Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1969); *see also Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159, 162-63 (1970).

The coaches and students adversely affected by this unjustified policy have standing to challenge it, as do their associations such as Petitioners. The court below departed from the precedents of this Court and the other Circuits by denying standing "[b]ecause the necessary elements of causation and redressability in such a case hinge on the independent choices of the regulated third party." 366 F.3d at 938. The government's gender quota in the proportionality test defines a safe harbor for schools from enforcement actions by government or litigation brought by private parties. There are not "inde-

pendent choices" in a meaningful sense of the phrase for schools to seek to qualify for this safe harbor. Petitioners have standing to challenge the policy that encourages schools to discriminate against them.

Petitioners also satisfied the associative requirements for standing. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 281 (1986) ("It has long been settled that even in the absence of injury to itself, an association may have standing solely as the representative of its members") (quotations omitted). *See also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973) (finding that the environmental group had standing to challenge an agency decision that adversely affected the group's members); *National Lime Ass'n v. EPA*, 233 F.3d 625, 636-37 (D.C. Cir. 2000) (holding that a trade association had standing to challenge a rule, even if some of its members support the rule).

II. THE DECISION BELOW DEPARTS FROM THE STANDARD FOR REDRESSABILITY.

The trial court erred in finding a lack of redressability. "Here, there is no direct action DoE could take in new Rule-making which would force education institutions to redress plaintiffs' alleged injuries." *National Wrestling Coaches Ass'n v. Department of Ed.*, 263 F.Supp.2d 82, 115 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004). That is plainly false. The court could prohibit adherence to the Department's encouragement of numerical balancing by enforcing Title IX as written, and colleges would surely stop relying on the proportionality test. Schools would not impose quotas if the government did not allow them. Instead, schools would allocate athletic opportunities under the more-flexible regulatory standard of equal opportunity, based on interest. *See* 34 C.F.R. § 106.41(c)(1). Legitimate student interest in competi-

tive sports would then be better served, and the scourge caused by quotas would diminish.

Yet the court below implicitly held that colleges might discriminate in the absence of the Department's interpretation, and that Petitioners therefore lack a redressable claim. If so, then many forms of official encouragement to discriminate would be immune from legal challenge. Nevertheless, this is not the law, as such encouragement reduces opportunity, and lost opportunity is redressable. *See, e.g., Competitive Enter. Inst. v. NHTSA,* 901 F.2d 107, 113 (D.C. Cir. 1990) ("We determined that a lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements"); *Center for Auto Safety (CAS) v. NHTSA,* 793 F.2d 1322, 1332-33 (D.C. Cir. 1986) (holding that a decrease in opportunity to purchase certain types of vehicles constituted injury in fact and established standing). This is particularly true where government action robs groups like Petitioners of the opportunity even to compete by placing them on an unequal footing versus a government-favored class. *Gratz v. Bollinger,* 539 U.S. 244, 261-63 (2003); *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1016 (D.C. Cir. 1997). The proportionality test authorizes and encourages numerical balancing by colleges, and Petitioners have standing to challenge that authorization and encouragement.

The 1996 Clarification to the proportionality rule included the following statement in its letter of transmittal: "The rules here are straightforward. ***An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.*** However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men." Letter from Norma V. Cantu, Assistant Sec'y, Office for Civil Rights, Dep't of Educ. (Jan. 16, 1996) at 4 (JA 146) (emphasis added). While this arguably may not require capping the number of participants on teams, it certainly does **authorize** it. Colleges are thereby authorized and

encouraged by government to reduce opportunities to men in order to meet the gender quota in part one of the three-part test. Removing that governmental authorization and promotion would surely end the pressure to eliminate men's teams for proportionality purposes, bringing relief to members of Petitioners.

III. THE DENIAL OF STANDING FOR REVIEW OF THE GENDER QUOTA EMBODIED IN THE "PROPORTIONALITY TEST" IS AN ISSUE OF HEIGHTENED NATIONAL IMPORTANCE.

Government quotas, racial or gender, is an issue of heightened national importance. *See, e.g., Gratz v. Bollinger*, 539 U.S. at 259 (2003) (invalidating a school's admission criteria described by the trial court as "the functional equivalent of a [racial] quota"). If unchecked, the gender quota in the "proportionality test" will continue to cause sweeping injustices and discrimination in colleges nationwide, and is already being applied to public high schools. Title IX quotas as now imposed even limit the use of privately raised funds to support school sports. *See* "Attack on freedom of association," *Chattanooga Times Free Press* (Tennessee), B7 (Nov. 29, 2004) (to comply with Title IX, privately raised funds must be equally distributed to boys' and girls' teams).

Discrimination inspired by the gender quotas is pervasive at the collegiate level. At Howard University, for example, male enrollment has dropped to less than 40% of its student body, and the government proportionality test encourages it to eliminate men's teams until fewer than 40% of its intercollegiate athletes are male. In 2002, it simultaneously eliminated both its varsity wrestling and baseball teams, leaving in the lurch its numerous athletes in those sports. Its wrestling coach Wade Hughes observed, "Howard University would like to look at this as a non-Title IX issue, but from my perspective, it is a Title IX issue in gender equality." Mark

Asher, "Howard Drops Baseball, Wrestling," *Washington Post,* D1 (May 23, 2002). Athletic Director Sondra Norrell-Thomas said it was due to a lack of facilities, but the wrestling coach pointed out that all the sport needs is a simple wrestling room, which they obviously had. *Id.* The athletic director could not deny it. *Id.* "Enrollment at [the University of Honolulu]-Manoa is 42 percent male and 58 percent female; thus, UH-Manoa has no men's soccer team or water polo team, but UH provides soccer and water polo teams for women; thus, many local boys who would have relied on those positions to attend college join thousands of minority men nationwide who are not able to go to college because of Title IX." Gerald Nakata, "Title IX is a Disservice to Males," *The Honolulu Advertiser*, 7A (Mar. 8, 2005).

Enforcement of Title IX quotas through the private cause of action has caused pervasive elimination of wrestling teams at colleges and universities. Michael Yount, "Football: The 800-Pound Gorilla in College Athletics," *The Salt Lake Tribune*, A1 (June 15, 2003) ("There were 363 NCAA wrestling teams in 1981 and 225 by the end of 2001. Men's gymnastics was never widely sponsored at the university level, but only 24 NCAA programs remained by 2001. BYU dropped both sports at the end of the 2000 school year."). In 1981-82, 52.7% of NCAA Division I colleges had a wrestling team. By 2000-01, only 27.1% of colleges did. *See* NCAA Sport-by-Sport Participation and Sponsorship - Men's Sports 1982-2001, at 119.[2] Despite a substantial increase in the number of colleges in the NCAA Division I during that period, the number of athletes competing in wrestling declined from 3,659 to 2,662. *Id.* Similar declines occurred in NCAA Divisions II and III.

Overall, the number of colleges in the NCAA increased from 787 to 1,049 from 1981-82 to 2000-01, yet the number

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[2] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/091-120.pdf (viewed Oct. 4, 2004).

of wrestlers declined from 7,914 to 5,966. *Id.* This decline is due not to high costs of wrestling (it is inexpensive) nor to any decline in demand, which remains high as reflected by the continuing popularity of high school programs. *See* National Federation of State High School Associations Participation Study 1971-01, at 191.[3]

The private cause of action has forced schools even to eliminate self-funded wrestling teams that impose no burden on the institution. *See* "Has Title IX's quest for equality gone too far? Title IX was designed to ensure equal opportunities for girls in school sports, but some say it has unintentionally hurt boys' teams," *New York Times Upfront* (Apr. 18, 2003). Why? Because private lawsuits enforce the informal quotas in a way that the Executive Branch never would.

The private litigants demand the "proportionality" that encourages colleges to reduce the proportion of men on sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy Interpretation directs that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). This bean-counting approach favors sports with large squad sizes for women, and reducing men's squad sizes or completely eliminating their teams. Petitioners have standing to challenge a government policy that incites and supports private causes of action, to their detriment.

The March 2001 General Accounting Office (GAO) report bears this out. In the 1980s and 1990s, women's sports with large squad sizes ballooned. *See* United States General Accounting Office (GAO), "Intercollegiate Athletics, Four-Year Colleges' Experiences Adding and Discontinuing Teams," GAO-01-297 [hereinafter, *GAO Report*] 12 (Mar.

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[3] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (viewed Oct. 4, 2004).

2001). Rowing (crew) is an example. It features the largest average squad size for women, an enormous 46.3 members per team. *Id.* at 9-12. The number of these teams increased by 184% during this time period, despite little to no interest at the high school level. *Id.* at 12. The University of Massachusetts women's rowing coach, Jim Dietz, bluntly admitted, "The reason we're here – everybody knows it – is for gender equity." Jessica Gavora, *Tilting the Playing Field* 66 (2002). Women's water polo, another large-squad-size sport, increased for women by 3,600%. *GAO Report* at 12. Women's equestrian teams, boasting an average squad size of 26.2, exploded with a 486% increase as athletic directors seek numerical balancing. *Id.* at 9-12. These increases result not from a boom in high school demand for these opportunities, but from colleges' attempt to boost women's participation numbers.

Meanwhile, a historically popular sport for women suffered the consequences of playing-by-the-numbers. Gymnastics fell by 53% during this time period. *Id.* at 12. During a time when Title IX required massive expenditures on women's sports to increase opportunities, women's gymnastics was cut from 190 teams to only 90. This reflects the small squad size of a gymnastics team, making it unattractive in the numbers game. The small squads of fencing and archery, other women favorites, also fell sharply. *Id.* As a result, nearly all of the women on the Olympic gymnastics team developed their skills in private clubs rather than Title IX programs. In the 2000 Olympics we failed to win a single women's gymnastics medal, and in 2004 the only gymnastics medals were won by private club, non-Title IX athletes.

In sports for which women share the practice facility with men, the elimination of the men's team means that the practice facility is eliminated for women too. Fencing is an example. The elimination of 42 men's fencing teams between 1981-82 and 1998-99 caused a similar elimination of nearly as many teams (31) for women. *GAO Report* at 12-13. Arch-

ery, too: the number of men's teams declined during the period to a total of only six in 1998-99, and the number of women's archery teams declined to the same small number. *Id.*

On the men's side, the combination of the proportionality test and private cause of action has caused declines in most of the large squad sports. Wrestling teams, as discussed above, have declined by 40%, reflecting a drop of the sport by an astounding 171 schools; 37 schools dropped football; 27 dropped outdoor track; 25 dropped swimming; and 10 ended ice hockey. *Id.* at 13.

An often-cited example by proponents of the proportionality test is women's soccer, which grew by 1,058% in college. *Id.* at 12. However, that growth is not attributable to the proportionality test. Rather, that is an example of how supply directly met demand *without* government quotas, as girls' soccer grew by 912% in high school over the comparable period.[4] Soccer serves as proof that intercollegiate teams increase in proportion to demand, without the need for gender quotas.

The encouragement of quotas by the proportionality test is senseless, and does not help women. They are not helped one iota when male athletes are cut from their teams by virtue of capping or eliminating teams. No one inside or outside of government has offered a rational defense of it, and the decision below simply ignores it. Capping teams is particularly harmful to "walk-ons", who are athletes neither recruited nor

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[4] According to the National Federation of State High School Associations, the number of girls' interscholastic soccer teams increased from 599 to 5,463 from 1977 to 1994, the high school years corresponding to the GAO's 1981-1998 survey of intercollegiate sports. *See* National Federation of State High School Associations Participation Study 1971-01, at 187. (http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (viewed Oct. 4, 2004)).

funded by scholarships. These are students who, simply out of their own enthusiasm, want to try out for a competitive team. They "walk on" the practice field and attempt to make the team, happy to sit on the bench while others play, as acclaimed in the popular movie "Rudy" (Columbia Tri-Star, 1993). Because they play for love of the sport and nothing else, consuming no scholarship or recruitment dollars, there is no justification for including them in a numerical balancing. Yet the proportionality test does arbitrarily include them, thereby giving colleges reason to impede the walk-ons. "[T]hree to four times more men than women arrive unsolicited for the first week of practices," and the proportionality test requires cutting many walk-ons previously allowed. Bill Pennington, "Want to Try Out for College Sports? Forget It," *N.Y. Times* (Sept. 22, 2002). Debbie Yow, the athletic director for the University of Maryland, admitted, "[t]he men's [lacrosse] coach has been turning players away while the women's coach has been literally begging women to fill out the roster." John Tierney, "Why Don't Women Watch Women's Sports?", Week in Review, *N.Y. Times* (June 15, 2003). "[I]n order to keep the number of male and female players balanced to comply with Title IX, the men's lacrosse team has had to reduce its roster." *Id.*

The gender quotas challenged here also fail to allow for differences in interest, age and susceptibility to injury between boys and girls, and men and women. "Female athletes, particularly basketball players, are far more likely than their male counterparts to suffer ACL [Anterior Cruciate Ligament] injuries." Stephen Hargis, "Girls have more torn ACLs," *Chattanooga Times Free Press* (Tennessee), D1 (Feb. 4, 2005). According to the American Academy of Orthopaedic Surgeons, the risk of women tearing their ACL is 1 in 100. This number drops significantly to only 1 in 500 for men. *See* Nikki Usher, "Knee injury takes toll on girls playing soccer five times more likely than males to suffer a torn ACL," *Philadelphia Inquirer*, A01 (Nov. 29, 2004). "Com-

pared with guys, female athletes run an eight-times-greater risk of tearing the ACL, a fibrous band that connects the shinbone (tibia) to the thighbone (femur). Basketball, soccer and other sports that require cutting moves or jump shots can put athletes at risk." Kathleen Fackelmann, "Girls face higher knee injury risk," *USA Today*, 15B (Aug. 24, 2004). Timothy Hewett, PhD, the lead researcher on a definitive study at the Sports Medicine Biodynamics Center at the University of Cincinnati, says this is "close to a billion-dollar problem in girls and women in the USA. ... Even after girls have recovered from the acute injury, the changes in the joint may set the stage for osteoarthritis of the knee ....." *Id.* That obvious suspicion was quickly confirmed: a study subsequently published in *Arthritis & Rheumatism* demonstrated that "more than half of ... 103 soccer players, who were ages 14 to 28 at the time of the ACL injury, suffered osteoarthritis of the knee at the time of the study -- about 12 years later." Kathleen Fackelmann, "Girls' knee injuries have later consequences," *USA Today*, 9D (Oct. 7, 2004). "Many of the women, who were about 31 by that time, also said they had pain or some other disability that made it hard to conduct daily activities." *Id.*

The discriminatory effects of the gender quotas are increasing as the percentage enrollment of women in colleges increases. As observed by the trial court below, men still hold onto a majority in varsity sports but face senseless cutting under the proportionality test to reduce their percentage on sports to the overall enrollment. 263 F.Supp.2d at 94. Also, the planned application of gender quotas to the high school level, and an onslaught of lawsuits by private parties if schools fail to meet the quotas, could force the elimination of over one million boys from high school sports.

In sum, Petitioners have standing to contest the policy that encourages exclusion of their members "from participation in ... any education program or activity receiving Federal financial assistance" on account of sex. 20 U.S.C. § 1681(a).

CONCLUSION

This Court should grant the Petition for *Writ of Certiorari*.

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